

KAREN G. ANDRES
ARBITRATOR
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration

between

AMALGAMATED TRANSIT UNION
LOCAL 1589

and

LONG BEACH PUBLIC TRANSPORTATION
COMPANY

(Soledad Belmudez Suspension
Arbitration)
FMCS Case No. 01-07156

ARBITRATOR'S

OPINION &

AWARD

APPEARANCES

For the Union:

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INTRODUCTION

The arbitration arose pursuant to the Agreement between Long Beach Public Transportation Company (Company/Employer) and Amalgamated Transit Union (Union) effective October 1, 2000. (Agreement or Contract).

Soledad Belmudez (Belmudez or grievant) a Company bus operator, appealed a ten (10) day suspension that stemmed from an incident that occurred on January 24, 2000.¹

Karen G. Andres was selected by the parties to serve as the neutral arbitrator of this dispute. Mr. Guy B. Heston, Assistant General Manager, Long Beach Transit, served as the Company arbitrator. Mr. Raul Mora, Union Vice President, served as the Union arbitrator. The matter was heard on October 11, at the Guesthouse Hotel, 5325 East Pacific Coast Highway, Long Beach, California. A Certified Shorthand Reporter attended the hearing to record the proceedings and testimony and subsequently produced a verbatim transcript thereof. Each party submitted a post-hearing brief completing the record herein.

II. ISSUE

The general issue defined by the parties is as follows:

Was there just cause for grievant's suspension of January 30 through February 14, 2000 and June 12 through June 14, 2000? If not, what is the appropriate remedy?

The underlying issues to be considered are:

- A. Did grievant violate the Company Violence in the Workplace Prevention Program (Violence in the Workplace policy)?
- B. Did grievant violate Company's Personal Conduct rule?

¹ All of the dates herein are in the year 2000 unless otherwise specified.

III. RELEVANT CONTRACT PROVISIONS

The Agreement was admitted into evidence as Joint Exhibit

(JX) 1. The relevant provisions are as follows:

Article 6: Management

The Company will continue to exercise exclusively the right to...make reasonable rules and regulations governing...the conduct of its employees. (JX-1, p. 4).

Article 21, section 5:

No charge shall serve as proper cause for discipline or discharge unless based upon a written entry in the employee's service record and is nonviolative of sections 1, 2, 3, and 4... (JX-1, p. 15).

Article 28, section 1:

The Company may require any of its employees to submit at any time to a physical examination by a physician duly licensed to practice as such.

Article 28, section 5:

Should any physical examination above provided (to) reveal physical or mental unfitness caused by disease, defects or disabilities of a temporary and curable nature, and the employee involved is willing to have the cause or causes of such unfitness treated and rectified then and in that event, depending upon the particular circumstances of each case:

- A. The employee involved may continue working while undergoing medical treatment if the examining physician shall certify to his/her ability to do so safely.
- B. The employee involved shall be taken out of service and give a leave of absence the purpose of undergoing medical treatment until such time as the examining physician shall certify his/her physical and metal fitness to perform again the duties for which he/she was employed...

Article 28, section 6:

Any employee when required by the Company to be relieved from duty for the purpose of taking a physical examination shall be paid for the time lost in taking such physical examination.

The Employee Handbook was admitted into evidence as JX-2.

The relevant provisions are as follows:

1.13 Personal Conduct

One reason you have been employed by LBT is because we believe you are a professional, and we expect you to act as one at all times. Just as you must be careful of your appearance, you must be careful of your language, your manners and your actions. In order to remain in the employ of LBT you must:

...Follow instructions of your supervisors.

Maintain the required standards of performance in your duties.

Refrain from being quarrelsome or an annoyance to fellow employees and the general public.

Refrain from the use of abusive, antagonistic, or disrespectful language in referring to the Company, its officials or members of the Supervisory Staff.

Maintain an attitude that promotes harmony within the Company.

Fighting or inappropriate language on LBT premises or while on duty is considered improper personal conduct. The use of boisterous, profane or vulgar language is prohibited... (Pp. 36-37).

Section 8 - DISCIPLINE

8.00 Violations of rules, special and general, or specific instructions is considered cause for discipline. Disciplinary actions taken by LBT are intended to correct improper performance by employees in the hopes that performance will improve. Disciplinary penalties may be determined by the General Manager, AGM Transportation, Director of Operations, Superintendent Operations or Operation Supervisors: subject to the right of the Union to file grievances, as appropriate. Discipline is and includes verbal warnings, cautions, reprimands, suspensions, and discharge. (P. 103-104).

8.18 Insubordination: (Example: Failure to accept and execute instruction from Supervisors or other Supervisory Personnel...First offense: suspend or discharge.

The Violence in the Workplace Prevention Program 2000 was admitted as JX-3. The relevant provisions are as follows:

ACTS OR THREATS OF PHYSICAL VIOLENCE, INCLUDING INTIMIDATION, HARASSMENT AND/OR FORCE, WHICH OCCUR ON LONG BEACH TRANSIT PROPERTY AND AFFECT THE COMPANY OR ITS EMPLOYEES WILL NOT BE TOLERATED. LONG BEACH TRANSIT WILL TAKE APPROPRIATE STEPS TO MINIMIZE VIOLENCE IN THE WORKPLACE. (p. 2).

Examples of workplace violence include, but are not limited to, the following:

- Threats or acts of violence occurring on Long Beach Transit premises, regardless of the relationship between the Company and the parties involved in the incident...(p. 4).

Specific examples of conduct that may be considered threats or acts of violence under this policy include but are not limited to the following:

- Threatening physical or aggressive contact directed toward another individual.
- Threatening an individual...with physical harm.
- Pretense threats (sic) of physical harm or like intimidation.

Workplace violence does not refer to the occasional comments of socially acceptable behavior. Such comments may include references to sporting events, popular entertainment or current events. It does refer to behavior that is personally offensive, threatening or intimidating. (p. 4).

V. FINDINGS OF FACT

After considering the testimony at hearing and recorded in the transcripts, the exhibits, and the arguments of the Union and the Employer, the following facts are determined to be relevant to the matter:

At the time of the arbitration, grievant had worked for the Company for twelve years. Between the end of 1999 and the

beginning of 2000, her mother was terminally ill. Ms. Belmudez was responsible for coordinating her mother's care at home and providing for much of her mother's personal needs. Ms. Belmudez was under enormous stress at this time.

In September and October 1999, Ms. Belmudez took Family Medical Leave (FML) leave pursuant to the Family Medical Leave Act (FMLA). She was entitled to extend the leave period until the end of 1999.

Grievant returned to work on October 4, 1999. She requested schedule accommodations so that she could care for her mother. She wrote on the forms, "FMLA" as the reason for the request. She did not obtain the required authorization from the Human Resources Department (HRD) to use FMLA for this purpose. The Operations Dispatch Supervisor (ODS), however, approved the requests from October 11, 1999 through January 24, 2000. Ms. Belmudez believed that FMLA rights included the option to modify her schedule as long as the changes did not impact negatively on operations. The ODS did not disabuse her of this perception.

On January 24, the Operations Department (OD) notified the HRD that Ms. Belmudez' requests for change of assignment were becoming disruptive. She received a note requesting that she meet with HR upon completion of her shift concerning her request for FML.

Grievant met with HRD Manager, LaVerne David (David). Ms. David raised the subject of FML. Ms. Belmudez stated that she was not on FML. Ms. David informed her that she could have 12 weeks of unpaid time off. The Company would not allow further change of assignments. Ms. David did not project an attitude of concern regarding grievant's situation. She did not attempt to work with grievant on scheduling changes.

Ms. Belmudez became upset, raised her voice and began to cry. She gestured emphatically with her finger on the table.² She told Ms. David that if anything happened to her mother because the Company refused a change of assignment, she would sue Ms. David and Long Beach Transit. Two other HRD employees responded to the shouting. Ms. David did not feel threatened.

After she left Ms. David's office, Ms. Belmudez encountered David Raley (Raley), the Company Safety Officer, in the parking lot. His account of their meeting, related in testimony and recorded in CX-9, was in large part corroborated by grievant.

Ms. Belmudez was very upset and emotional. She referred to Ms. David as "a stupid bitch". She said she could have thrown something at her in their meeting if she had the opportunity.

Mr. Raley tried to calm grievant. She was in an extremely agitated state, and it was unsafe for her to drive home. She

² Ms. David testified that Ms. Belmudez raised her fist in a threatening gesture. She did not mention or record this perception on any previous occasion. The arbitrators do not conclude that Ms. David lied in testimony. People recall situations differently. We accept grievant's account of the gesture.

said that the Company did not understand what she was going through at home and with the public. She understood how an employee could snap and come on the property shooting. "That bitch has no right to tell me I have to take FMLA". (CX-9). She did not make a threat or say that she had any intention of using a gun or of committing any violent act. Mr. Raley and Ms. Belmudez hugged good-bye.

Mr. Raley considers himself to be a friend of grievant. He did not feel threatened in the encounter. He felt it was his duty to report the interaction.

On January 30, 2000, grievant was placed on mandatory unpaid leave pending investigation of the remarks she made in the parking lot on January 24. The Company feared that Ms. Belmudez would or could resort to violence.

On February 7, the Employer sent Ms. Belmudez to the Baron Center for a workplace violence safety assessment under the Violence in the Workplace Policy. She was paid for this day.

Dr. Anthony Baron conducted the assessment. On a 1 to 5 scale for workplace violence, with Level 1 is no risk, he rated grievant as Level 2 Low Risk. He stated in the Confidential Risk Assessment and Fitness for Duty Evaluation dated February 8, 2000, "Although infrequent, her temper outbursts may turn into uncontrollable rages...the other risk factors normally

associated with a higher ranking are missing...A supportive approach in managing her current stressors will reduce the outbursts. It is recommended that there be two individuals in any meeting with Ms. Belmudez. Special scheduling considerations, if possible will assist her in the care of her mother and reduce current anxiety. If Ms. Belmudez continues to act contrary to Long Beach Transit policy, and the company wishes to retain her, long term mandated counseling is in order." (CX-8).

In a meeting on February 14, The Company referred grievant to the Employee Assistance Program (EAP) for counseling. In a letter of February 18, 2000, Graham Ridley (Ridley), Operations Manager, instructed Ms. Belmudez to complete a program recommended by the EAP. (UX-1). The letter did not state that grievant could not return to work without completion of the program. Mr. Ridley also stated that the time off pending the outcome of the investigation would be unpaid and would be considered to be a suspension.

Robyn Gordon, Human Resources Administrator for HRD made it clear to Ms. Belmudez in two telephone conversations subsequent to the February 14 meeting that she must go to the EAP as a condition of returning to work.

Ms. Belmudez took sick leave from February through June 2000. When she called to clear to return to work on June 16, she had not participated in the therapy program selected by the EAP. The EAP had recommended that Ms. Belmudez see a particular medical provider who was experienced in anger management. Grievant saw another doctor who was not experienced in anger management. She thought she could complete the EAP-recommended program after she returned to work.

HRD made it clear that grievant could not return to work without participation in the program. The Company received confirmation that grievant was engaged in the EAP process, and she returned to work three days later.

The third step meeting on the grievance was held on September 21, 2000. Pamela Barr, Company Executive Director, Labor Relations, rendered a decision on October 2, 2000. Ms. Barr determined that because of Ms. Belmudez' behavior on January 24, 2000, it was reasonable for the Company to be concerned for her safety and the safety of others and to set up a medical assessment. The time lost due to that assessment (January 30 through February 14, 2000) remained unpaid. (CX-11).

Ms. Barr acknowledged that Mr. Ridley's February 18 letter did not state that the program recommended by the EAP had to be completed prior to grievant's return to work. In fact, Ms. Belmudez had been returned to work on February 15 but called in

sick and did not attempt to come back until June. Ms. Barr added, however that, "Ms. Belmudez had over four months to complete the EAP management referral and refused to do so. It does not appear unreasonable for the Company to require her to do this before returning to work, particularly due to the fact that she had been off work for a long period of time.

"Notwithstanding the above, in an effort to resolve these grievances, it is my decision to reimburse Ms. Belmudez for three days..." (CX-11).

The Union attempted to introduce evidence of disparate treatment of other employees' alleged violation of Operations Department Handbook section 1.13. There was no direct evidence available on the facts of these cases, and they do not have evidentiary value. There was also no reliable evidence presented of Company retaliation against grievant.

VI. OPINION

Having carefully reviewed and weighed the testimony and evidence presented at the hearing, and after considering each argument raised by the parties in their briefs, the arbitrators reach the following conclusions:

It is impossible to separate the January 24 incident from the political and social climate of our times. In recent years, violence in the work place has become a source of great concern nationally. Employers are concerned and fearful about violence.

An angry employee may utter words that could be construed as threatening without the serious intention of acting on those words.

The Company's Violence in the Workplace policy does not state that an employee is prohibited of making any reference to a violent act. In order for the policy to apply to an event, an employee must make an actual threat and not merely mention how some unnamed person **could** become violent if provoked or how he or she could have thrown something in a past encounter.

Grievant did not make a verbal threat in her conversation with Mr. Raley. Nor did she physically threaten Ms. David in their meeting on January 24. Her behavior was, however, agitated enough and provocative enough to evoke the Employer's fear and concern.

A bus driver provides transportation services to the public. External pressures characterize the job. A rider can be provocative or obstreperous, traffic and road conditions are likely to challenge one's patience. Safe functioning requires a cool head. It is crucial to maintain public and employee safety. The Employer would be remiss in ignoring a potential safety hazard such as a highly emotional, agitated driver.

While it is found that grievant did not violate the Company's Violence in the Workplace policy, the Employer was within its rights to order a workplace violence safety

assessment under Article 28, section 1. The Company was also within its right to make a mandatory referral to the EAP and require completion of the EAP recommended therapy.

Under Article 28, section 6 of the Agreement, an employee who is required by the Company to be relieved from duty for the purpose of taking a physical examination shall be paid for the time lost in taking such physical examination. It is reasonable for grievant to expect payment for participation in a mental health evaluation as well. The Company erred in stating that the time lost due to the assessment would remain unpaid. (CX-11).

Violation of the Employee Handbook, section 1.13 Personal Conduct, is a cause for discipline under Section 8 of the Employee Handbook. Grievant was quarrelsome and an annoyance to fellow employees. The use of the term, "stupid bitch" fell within the clause of abusive, antagonistic, or disrespectful language in referring to the Company, its officials or members of the Supervisory Staff. By yelling and gesturing emphatically, Ms. Belmudez did not "Maintain an attitude that promotes harmony within the Company" in her interaction with Ms. David and Mr. Raley. Her language and conduct was "inappropriate, boisterous, profane and vulgar" within the meaning of section 1.13 (pp. 36-37).

The question arises whether grievant was insubordinate in failing to engage in the EAP recommended program during her sick

leave and whether she had to complete this program before returning to work. (Article 28, section 5).

Insubordination was one of the factors that could lead to the imposition of a suspension according to the Agreement. (Section 8.19). A finding of insubordination is appropriate when an employee fails to submit to authority by ignoring or disobeying a direct order the supervisor is entitled to give and entitled to have obeyed. Parrish v. Civil Service Commission (1967) 66 Cal.2d 260. The fact finder must also find that the failure to comply with the direct order was intentional and willful conduct. Coombs v. State Personnel Board (1963) 215 Cal. App. 2d 770.

There was some misunderstanding on grievant's part regarding when she was required to complete the EAP recommended therapy. She did not follow the employer's directions. It was in question, however, whether she had intentionally disobeyed a direct order. In part because of this, Ms. Barr reimbursed the three days' pay that was docked due to insubordination.

While as previously stated, the Employer violated the Agreement when it docked grievant for the time lost due to the assessment. The Company was, however, within its right to convert the time off pending the outcome of the investigation to a suspension.

Penalty

The penalty imposed by the Company originally amounted to a suspension of thirteen (13) days. Ms. Barr's decision resulted in reimbursement of three days of pay, which left ten (10) days suspension.

It would not be unreasonable for the employer to impose a suspension of ten days or longer for Ms. Belmudez' outbursts. There are ameliorating factors, however.

The illness and impending death of a parent leads to enormous stress and emotional upheaval for an adult child-caretaker. While the Company allowed scheduling changes for a time period, it appears that the Employer did not treat Ms. Belmudez in a sympathetic manner or make an overt attempt to work with her and her temporary, extreme problem. It exacerbated rather than helped to alleviate some of the pressure.

On the other hand, Ms. Belmudez' testimony did not help her case. She projected an unrepentant attitude and did not accept responsibility for her actions. It is important for Ms. Belmudez to realize that, although the stress of her situation was certainly understandable, her remarks and behavior caused fear and legitimate concern by the Company.

Grievant had good employee evaluations. She had no history of prior discipline.

For all of the reasons above, the arbitrators have agreed
on a penalty of seven(7)days suspension.

DATED: January 22, 2002

KAREN G. ANDRES, ARBITRATOR

GUY B. HESTON, COMPANY ARBITRATOR

RAUL MORA, UNION ARBITRATOR